Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 79-384

ROBERT J. BENSON,
Petitioner

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
Respondent

v.

ATLANTIC & GULF STEVEDORES, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Attorney for Petitioner

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SUPREME COURT OF THE UNITED STATES
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NO.

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v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Robert J. Benson, petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit in the entitled case rendered on June 8, 1979.

OPINIONS BELOW

The Court of Appeals for the Third Circuit did not file an opinion. Its judgment order appears as Benson v. American Export Isbr. Lines, Inc. et al., No. 78-2213 (3d Cir., decided June 8, 1979).

The District Court's Order and Memorandum is also unreported. It appears as Benson v. American Export Isbr. Lines, Inc. et al., Civil Action No. 68-1387 (E.D. Pa., decided July 12, 1978). The order and memorandum of the

District Court and the judgment order of the Court of Appeals are printed in the appendix to this petition.

JURISDICTION

Petitioner seeks review of the judgment order of the United States Court of Appeals for the Third Circuit, dated June 8, 1979, and the order of the United States District Court for the Eastern District of Pennsylvania, dated July 12, 1978, which it affirmed.

Jurisdiction is conferred upon the Supreme Court by Title 28, U.S. Code, Section 1254(1)

QUESTION PRESENTED

Did the District Court and the Court of Appeals deprive a longshoreman and his counsel of property without due process of law in violation of the Fifth Amendment by ordering that a personal injury judgment in favor of the longshoreman against a shipowner should be marked "satisfied" and execution thereon should be stayed pursuant to the employer-stevedore's motion where the District Court erroneously treated the stevedore's overpayments of compensation as though they were payments upon the judgment by the shipowner because of an indemnity contract between the stevedore and the shipowner, where the effect of said order deprives his counsel of a large part of his contingent fee which was to be based upon the sums recovered solely from the shipowner, and said order gives the stevedore a corresponding credit therefor against future compensation it would otherwise have to pay the longshoreman, and the District Court, in patent error, declares that the issues thus presented were previously decided and are res judicata?

CONSTITUTIONAL PROVISIONS

Constitution of the United States of America, Amendment 5, provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Jurisdiction of the United States District Court was based upon diversity of citizenship and an amount in controversy in excess of $10,000, exclusive of interest and costs, under 28 U.S.C. §1332, and upon admiralty and maritime jurisdiction under 28 U.S.C. §1333.

On April 17, 1968, Robert Benson (hereinafter referred to as "longshoreman") was severely and permanently injured while working for Atlantic & Gulf Stevedores, Inc. (hereinafter referred to as "stevedore") upon a ship owned by American Export Isbrandtsen Lines, Inc. (hereinafter referred to as "shipowner"). The longshoreman sued the shipowner who joined the stevedore as a third-party defendant, claiming indemnity. Prior to the trial, the stevedore and the shipowner settled the indemnity action. The stevedore agreed to defend the

shipowner and to pay one-third of any recovery by the longshoreman from the shipowner.

After a trial, post-trial motions, an appeal to the Court of Appeals for the Third Circuit, Benson v. American Export Isbrandtsen Lines, Inc., 478 F. 2d 152 (C.A. 3, 1973) and denial of the longshoreman's petition for certiorari by the Supreme Court, 414 U.S. 1145, 94 S. Ct. 898 (1974) final judgment was entered in favor of the longshoreman against the shipowner in the sum of $69,469.76, with interest from January 26, 1971, the date of the verdict, and costs were taxed April 19, 1974 at $1,393.54. When the longshoreman sought payment of the entire judgment, interest and costs the shipowner moved the District Court for leave to deposit into court $56,157.49, representing two-thirds of the judgment indebtedness, interest and costs. On June 5, 1974 the District Court granted the motion and ordered the deposit to be paid by the Clerk to the longshoreman.

In the meantime, the stevedore, purporting to act also for the shipowner, filed a motion in which it averred that it had disbursed compensation benefits totalling $23,061.21 to the longshoreman. It claimed a lien pursuant to 33 U.S.C. §933 in that amount, averring that the longshoreman contested the lien and praying that the judgment against the shipowner be marked satisfied upon payment of the judgment less the amount of the lien, interest on that remainder and the costs. The longshoreman answered this motion, asking for an accounting of the amount claimed by the stevedore and denying that in equity the stevedore was entitled to any lien because it had acted in the litigation against the shipowner in conflict with his interests. His Answer requested that the District Court enter an order permitting any payment into court any payor desired to be credited against the judgment, interest and costs, without prejudice to plaintiff's right to issue execution for the remainder until the entire sum due was paid; to further order that the Clerk shall pay all sums received immediately to plaintiff; and to declare and adjudge that the stevedore did not have any equitable lien or right to any portion

of the longshoreman's recovery. The stevedore then amended its motion, to which the longshoreman responded; then it filed a second amended motion. The longshoreman answered the second amended motion, demanding payment of the balance of the entire judgment, interest thereon and costs, and praying the Court to decree that the stevedore did not have any lien or right of subrogation against the recovery for the reasons previously set forth.

On these pleadings, and without a hearing, the District Court entered an order on April 11, 1975, that the stevedore was "entitled to receive or retain, from the proceeds of the judgment in this case, a sum equal to the amount of its compensation lien as of the date of entry of judgment, with interest thereon from the date of entry of judgment, plus the amount of any compensation paid to plaintiff since that date, with interest thereon from the date of payment. Upon payment to the plaintiff or deposit in the registry of the Court of the balance of the judgment, interest and costs, the judgment shall be marked SATISFIED". A copy of this order and the supporting memorandum is appended to this petition.

The longshoreman appealed from that order to the Court of Appeals, assigning as the sole question presented for review whether the district court erred in holding that the stevedore was entitled to subrogation in view of the stevedore's actions in conflict with the longshoreman's interests in the litigation against the shipowner. On January 13, 1976, the Court of Appeals entered the following judgment order, without opinion:

> "Appellant Benson, a longshoreman, contends that the district court erred in enforcing a lien on a judgment in his favor against American Export Isbrandtsen Lines, Inc., in favor of his employer, Atlantic & Gulf Stevedores, Inc., a stevedore. We find no error.
>
> "It is therefore ORDERED and

> ADJUDGED that the judgment of the district court is affirmed. Costs taxed against appellant."

This judgment order is not reported.

The District Court's order of April 11, 1975, did not stay execution upon the judgment of the longshoreman against the shipowner, and made no mention of the shipowner. It did not state how the judgment creditor (the longshoreman) was to collect "the proceeds of the judgment".

Counsel for the stevedore, still purporting to act for the shipowner as well as the stevedore, filed a "Motion to Stay Execution and to Mark Judgment Satisfied" giving rise to the present proceedings. The longshoreman filed an Answer, averring that the judgment should not be marked satisfied because it had not been fully paid due to the stevedore's interference with collection, and that if the present motion were granted it would prevent performance of the condition of his contingent fee contract which would entitle his counsel to the balance of his fee on the unpaid portion of the judgment as well as any balance owing to him. The longshoreman asked the District Court to order the shipowner to pay the unpaid balance of the judgment, interest and costs to him whereupon that judgment shall be marked satisfied, and after payment of the longshoreman's counsel fees and expenses, the longshoreman shall pay the stevedore's lien.

On July 12, 1978, without a hearing, the District Court entered the subject order staying execution and directing the Clerk to mark the judgment "satisfied". In its unreported Memorandum in support thereof, it asserted that all issues raised by the stevedore's motion and the longshoreman's answer "were discussed and decided in this Court's Memorandum and Order of April 11, 1975". [Emphasis supplied] The order and memorandum are printed in the appendix to this petition. In so stating, the District Court was patently mistaken. In those prior proceedings, the matter of the

priority of the right of the longshoreman's counsel to his fees and expenses upon the recovery was never raised by the motions and answers, never litigated, argued nor decided by the District Court. In its unreported memorandum of April 11, 1975, the District Court did discuss the decisions relating to the absence of liability of stevedores to pay a portion of the longshoremen's counsel fees in such cases, but stated:

> "The foregoing references to the issues of attorney's fees and allowance of interest have been included here for contextual purposes, and because the precedents on those issues provide at least some guidance in the issue involved in the present case."

Thus, the District Court, at that point in time, had clearly understood that the matter of counsel fees was not an issue then being decided. Thus, similar issues had been discussed but had not been decided by that memorandum and order.

The District Court went on to assert in its memorandum of July 12, 1978, "It is very clear that the full amount of the judgment, over and above the lien of the third-party defendant, has been paid to the plaintiff", thereby treating the stevedore's over-payments of compensation to the longshoreman until May 24, 1977, as though these were payments by the ship. However, the overpayments of compensation were not payments upon the judgment against the shipowner and counsel for the longshoreman had no right to be paid his contingent fee from such overpayments.

The longshoreman appealed from the order of July 12, 1978 to the Court of Appeals for the Third Circuit. On June 8, 1979, the Court of Appeals entered the following judgment order, without opinion:

> "After consideration of all contentions raised by the appellant, it is
>
> "Adjudged and Ordered that the judgment of the district court be and is hereby affirmed.
>
> "Costs taxed against appellant."

The judgment order is unreported to date. Petitioner petitions for a Writ of Certiorari to this Honorable Court to review that judgment order and the District Court's order and memorandum which it affirmed.

ARGUMENT

Petitioner and his counsel have been deprived of property without due process of law by the District Court's erroneous decision that the issues raised by the stevedore's Motion to Stay Execution and to Mark Judgment Satisfied, and the longshoreman's Answer thereto, were decided previously by the Court. If the order of the District Court of April 11, 1975, encompassed the issues presented by the subject motion and answer, neither the longshoreman nor his counsel were given notice of those issues by the prior motions and the answers thereto. They did not mention anything about the longshoreman's counsel fees and litigation expenses.

In Sylvan Beach, Inc. v. Koch, 140 F. 2d 852 (C.A. 8, 1944) the court said, at pp. 861-862:

> "A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved."

The court held that in the absence of notice to a party of the claim made against him and of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity, citing Ochoa v. Hernandez, 230 U.S. 139, 161, 33 S. Ct. 1033, 57 L. Ed 1427 (1913) and Postal Telegraph Cable Co. v. City of Newport, 247 U.S. 464, 476, 38 S. Ct. 566, 62 L. Ed. 1215 (1918) among other cases.

In Postal Telegraph Cable Co. v. City of Newport, the Supreme Court declared, at 247 U.S. 476:

> "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. Southern Pacific R.R. Co. v. United States, 168 U.S. 1, 48; Greenleaf Ev., §§522-523. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Windsor v. McVeigh, 93 U.S. 274, 277; Louisville & Nashville R.R. Co. v. Schmidt, 177 U.S. 230, 236; Simon v. Craft, 182 U.S. 427, 436."

As previously noted the District Court originally recognized that its order of April 11, 1975 was not deciding any issue pertaining to priority of counsel fees and expenses over a compensation lien or questions of interest in its supporting memorandum. It stated that the reference to Davis v. United States Lines Co., 253 F. 2d 262 (C.A. 3, 1958), deciding that a stevedore need not share payment of the longshoreman's counsel fees and expenses pro rata, and to Candiano v. Moore-McCormack Lines, Inc., 407 F. 2d 385 (C.A. 2, 1969), deciding that a longshoreman was entitled to interest only on his share of the recovery, were made for "contextual p rposes" and because they provided "some guidance on the issue involved in the present case". The sole issue decided then was whether the stevedore had forfeited its lien altogether. The order of April 11, 1975 held that the stevedore was entitled to receive payment of its compensation lien as of the date of entry of judgment against the shipowner, with interest from that date, plus the amount of any compensation paid to the longshoreman since that date, with interest. It further provided that upon paymentof any balance of the judgment, interest and costs to the plaintiff the judgment should be marked satisfied. The District Court failed to decide whether the longshoreman was entitled to the accounting for the amount of the claimed lien, as he requested.

Upon appeal from that order the sole question was whether the District Court erred in ruling that the stevedore had not forfeited its lien.

In view of the foregoing, the District Court's declaration in its memorandum of July 12, 1978, that "all of the issues raised by that Motion, and by plaintiff's strenuous opposition hereto, were discussed and decided in this Court's Memorandum and Order of April 11, 1975" was clearly mistaken.

The question presented to the Court of Appeals for the Third Circuit on appeal from the order of July 12, 1978, was whether the District Court erred in refusing to allow the longshoreman to issue execution for the full amount of his judgment, interest and costs against the shipowner, in refusing to direct payment therefrom of his counsel fees, costs and expenses of litigation, and, from the balance remaining, to the stevedore in partial payment of its lien with any unpaid balance to be credited against its liability for future compensation benefits until full credit for said lien has been obtained by the stevedore. The longshoreman pointed out, in his brief, that the District Court's assertion that the matter was res judicata was mistaken. Nevertheless, the Court of Appeals affirmed the District Court's order without an opinion.

By reason of the foregoing misapplication of the doctrine of res judicata, the lower courts have given a lien to the stevedore for its payments of compensation to the longshoreman after the date of the original judgment, January 26, 1971, until it stopped such payments on May 24, 1977. Since that increase in the lien to May 24, 1977 then approximated or exceeded the balance of the judgment, interest and costs due from the shipowner, the District Court stated in its memorandum of July 12, 1978:

> "It is very clear that the full amount of the judgment, over and above the lien of the third-party defendant, has been paid to plaintiff. Indeed, the lien exceeds the amount for which the third-party defendant is entitled to credit; that is, the third-party defendant will have the right to recoup additional sums by suspension of compensation payments for a further period."

By so holding, the District Court effectively allowed the stevedore to reduce the longshoreman's verdict and judgment from $69,469.76 to $45,768.55, with interest on the latter sum of $8,995.40 and costs of $1,393.54, which composed the shipowner's deposit into court of $56,157.49. It treated overpayments of compensation by the stevedore as though they were payments by the shipowner against the judgment, but, at the same time, allowed the stevedore to recoup those overpayments by way of credits against its future liability to pay compensation. In consequence of this treatment, counsel for the longshoreman is deprived of that portion of his contingent fee to which he should have been entitled upon collection of the entire judgment he obtained in this action, and the stevedore is given the amount of that fee as credit against future compensation it would otherwise owe.

The reason for this outcome is that counsel for the longshoreman was only entitled to be paid a contingent fee on the recovery from the shipowner. He was not entitled to any fee because of payments of compensation to the longshoreman by the stevedore, whether they were erroneous overpayments or not.

Due process of law inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure, and without notice or opportunity for a hearing. Ochoa v. Hernandez Y. Morales, 230 U.S. 139, 57 L. Ed. 1427, 33 S. Ct. 1033 (1913). One who acquires rights by way of an administrative or judicial proceeding cannot be deprived of them without notice and opportunity to be heard. Garfield v. U.S., 211 U.S. 249, 53 L. Ed 168, 29 S. Ct. 62 (1908).

Had the District Court permitted collection of the judgment by execution in the usual, customary mode of procedure when the judgment became final after the first appeal to the Court of Appeals was decided and the shipowner made its partial payment on June 10, 1974, the following distribution could have been made:

Judgment		$69,469.76
Interest thereon from 1/26/71 to 6/10/74		14,241.30
Costs taxed		1,393.54
Total judgment debt		$85,105.60
Less: Lien of Counsel for Longshoreman:		
Costs and Expenses	$ 3,951.09	
Counsel fee, 1/3 of Net Recovery	$27,051.50	$31,002.50
Longshoreman's Distributive Share:		$54,103.10
Less: Lien of Stevedore as of 6/10/74:		
Compensation Benefits Paid	$21,597.76	
Approximate Interest thereon from 1/26/71 (overestimated on lump sum, since payments were actually paid weekly)	$ 4,373.53	$25,971.29
Net amount due to longshoreman		$28,131.81(+)

The stevedore would have been compelled to resume payments of compensation after its liability for future compensation benefits equalled $28,131.81, the net amount received by the longshoreman. Nacirema Operating Co. v. Oosting, 456 F. 2d 956, 1972 A.M.C. 1517 (C.A. 4, 1972) cert. den. 409 U. S. 580; Stark v. Shell Oil Co., 450 F. 2d 994 (C.A. 5, 1971); Voris v. Gulf Tide Stevedores, 211 F. 2d 549 (C.A. 5, 1954); Senate Report No. 428 to 1959 Amendment of the Act: "The bill, as amended, provides

that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery", U.S. Code Cong. and Admin. News, p. 2135 (1959). However, under the lower courts' decisions, counsel for the longshoreman will receive only $21,353.22 for his contingent fee and expenses, or $9,649.28 less than he would otherwise have been entitled to receive, while the stevedore will get credit against its future liability for compensation for its lien as of June 10, 1974 and overpayments of compensation from June 10, 1974 until May 24, 1977, totalling $10,780.00.

The refusal of the District Court to correct this injustice on the mistaken notion that the matter was res judicata and the affirmance of that decision by the Court of Appeals, deprives petitioner and his counsel of their property without due process of law in that it deprived them of all remedy for enforcement of their rights. Compare Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 682, 74 L. Ed. 1107, 50 S. Ct. 451 (1930).

CONCLUSION

The lower courts have failed to permit enforcement of a District Court judgment for damages in the usual, customary manner by execution process, and by so doing, have deprived petitioner and his counsel of a portion of their interests in that judgment. Petitioner prays that a Writ of Certiorari issue to review the procedure followed by the District Court and approved by the Court of Appeals, and to clarify the correct mode for collection of judgments in longshoremen's personal injury cases and determining the priorities of the lien of counsel for the longshoreman and the lien of the stevedore where the recovery is sufficient to pay both liens.

Respectfully submitted,

George J. O'Neill

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1405 Locust Street
Philadelphia, Pa. 19102
(215) 735-7665

Counsel for Petitioner
Robert J. Benson

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2213

ROBERT J. BENSON,
Plaintiff-Appellant

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.
Defendant-Appellee

v.

ATLANTIC & GULF STEVEDORES, INC.,
3rd Party Defendant-
Appellee

(Civil No. 68-1387, E.D. of Pa.)

Argued June 5, 1979

Before: WEIS and GARTH, Circuit Judges and MEANOR*, District Judge.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

Attest:

M Elizabeth Ferguson
Chief Deputy Clerk

By the Court,

Weis
Circuit Judge

DATED: June 8, 1979

* Honorable H. Curtis Meanor, United States District Court for the District of New Jersey, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate on July 2, 1979.

Test: M Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

Costs taxed in favor of appellee, Atlantic & Gulf Stevedores, Inc., as follows:

Brief.....$292.50

COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT J. BENSON	:	CIVIL ACTION
v.	:	
AMERICAN EXPORT ISBRANDTSEN LINES, INC.	:	
	:	
v.		
	:	
ATLANTIC & GULF STEVEDORES, INC.	:	NO. 68-1387

O R D E R

AND NOW, this 12th day of July, 1978, it is ORDERED:

1. That the Motion of the third-party defendant, Atlantic & Gulf Stevedores, Inc., to stay execution and to mark judgment satisfied, is GRANTED.

2. The Clerk is directed to mark the judgment in this case "SATISPIED."

J.

IN THE UNITED STATES DISTRICT COURT /

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

8/10

ROBERT J. BENSON	:	CIVIL ACTION
v.	:	
AMERICAN EXPORT ISBRANDTSEN LINES, INC.	:	
	:	
v.		
	:	
ATLANTIC & GULF STEVEDORES, INC.	:	NO. 68-1387

JUL 13 1978

MEMORANDUM AND ORDER

FULLAM, J. July 12, 1978

Since its inception, this litigation has tended to generate more heat than light, a circumstance which has not facilitated the expeditious decision of third-party defendant's "Motion to Stay Execution and to Mark Judgment Satisfied." In actuality, however, all of the issues raised by that Motion, and by plaintiff's strenuous opposition thereto, were discussed and decided in this Court's Memorandum and Order of April 11, 1975, which was affirmed by the Court of Appeals for the Third Circuit by a Judgment Order entered January 13, 1976 (No. 75-1642).

That Order provides:

> "AND NOW, this 11th day of April, 1975, it is ORDERED that Atlantic & Gulf Stevedores, Inc. is entitled to receive or retain, from the proceeds of the judgment in this case, a sum equal to the amount of its compensation lien as of the date of entry of judgment, with interest thereon from the date of entry of judgment, plus the amount of any compensation paid to plaintiff since that date, with interest thereon from the date of payment. Upon payment to the plaintiff, or deposit in the registry of this Court, of the balance of the judgment, interest and costs, the judgment shall be marked SATISFIED.
>
> "John P. Fullam, J."

It is very clear that the full amount of the judgment, over and above the lien of the third-party defendant, has been paid to the plaintiff. Indeed, the lien exceeds the amount for which the third-party defendant is entitled to credit; that is, the third-party defendant will have the right to recoup additional sums by suspension of compensation payments for a further period. Final adjustment of the account, between plaintiff and the third-party defendant, is within the province of the compensation authorities, and not this Court.

It is obvious that plaintiff's real quarrel is with the rule of Davis v. United States Lines Co., 253 F.2d 262 (3d Cir. 1958), and with this Court's Order of April 11, 1975, and the Court of Appeals Order of affirmance. The Motion of the third-party defendant must be granted.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 75-1642

ROBERT J. BENSON,
Appellant

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

v.

ATLANTIC & GULF STEVEDORES, INC., 3rd pty deft.

(D.C. Civil Action No. 68-1387)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
January 12, 1976
Before HASTIE, GIBBONS and ROSENN, Circuit Judges

George J. O'Neill, Esq.
Suite 1600
1405 Locust Street
Philadelphia, Pennsylvania 19102
Attorney for Appellant

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Charles W. Craven, Esq.
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Attorneys for Atlantic & Gulf Stevedores, Inc

J U D G M E N T O R D E R

Appellant Benson, a longshoreman, contends that the district court erred in enforcing a lien on a judgment in his favor against American Export Isbrandtsen Lines, Inc., in favor of his employer, Atlantic & Gulf Stevedores, Inc., a stevedore. We find no error.

It is therefore O R D E R E D and A D J U D G E D that the

judgment of the district court is affirmed. Costs taxed against appellant.

By the Court,

Circuit Judge

Attest

Thomas F. Quinn
Clerk

Dated: JAN 13 1976

Certified as a true copy and issued in lieu of a formal mandate on February 4, 1976.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellee, Atlantic & Gulf Stevedores, Inc., as follows:

Brief.....$413.09

COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT J. BENSON	:	CIVIL ACTION
v.	:	
AMERICAN EXPORT ISBRANDTSEN LINES, INC.	:	
v.	:	
ATLANTIC & GULF STEVEDORES, INC.	:	NO. 68-1387

O R D E R

AND NOW, this 11th day of April, 1975, it is ORDERED that Atlantic & Gulf Stevedores, Inc. is entitled to receive or retain, from the proceeds of the judgment in this case, a sum equal to the amount of its compensation lien as of the date of entry of judgment, with interest thereon from the date of entry of judgment, plus the amount of any compensation paid to plaintiff since that date, with interest thereon from the date of payment. Upon payment to the plaintiff, or deposit in the registry of this Court, of the balance of the judgment, interest and costs, the judgment shall be marked SATISFIED.

J.

ROBERT J. BENSON : CIVIL ACTION

v. :

AMERICAN EXPORT ISBRANDTSEN LINES, INC. :

v. :

ATLANTIC & GULF STEVEDORES, INC.: NO. 68-1387

MEMORANDUM AND ORDER

FULLAM, J. April ||, 1975

In Benson v. American Export-Isbrandtsen Lines, Inc., 478 F.2d 152 (1973), the Court of Appeals remanded this case for the entry of judgment in the full amount of the plaintiff's damages, $69,469.76, without reduction for contributory negligence. The issue now before this Court is the extent to which the judgment is subject to a lien for compensation paid to the plaintiff under the Longshoremen's and Harbor Workers Act, 33 U.S.C. §§1901 et seq.

In its original form, that statute contemplated an election by an injured employee as to whether to collect compensation benefits from his employer pursuant to the Act, or to pursue a claim for damages against third parties. Acceptance of benefits under the Act had the effect of assinging to the employer the injured workman's claims against third parties. If the employer pursued this assigned cause of action and obtained a recovery, the employer was entitled to retain therefrom (a) reimbursement of the costs of litigation, including attorney's fees, (b) reimbursement of benefits paid, (c) reimbursement of the present value of future benefits payable under the Act, and

(d) 20% of the recovery; only the balance was then payable to the employee. If, however, the employer did not seasonably pursue the assigned claim, the injured workman could file suit in his own name, and the recovery would then be credited against the employer's liability for compensation under the Act. Czaplicki v. S.S. Hoegh Silver Cloud, 351 U.S. 525 (1956); Johnson v. Sword Line, Inc., 257 F.2d 541 (3d Cir. 1968).

In 1959, the statute was amended so as to remove the necessity for an election by the employee. Under the present law, 33 U.S.C. §933, the injured workman may accept compensation payments without prejudice to his right to bring suit against third parties for damages, provided the suit is filed within six months after the date of injury. However, the employer is entitled to subrogation, to the extent of benefits actually paid; and this right of subrogation gives rise to a lien against the proceeds derived from the third-party litigation.

At least three sets of problems can arise in attempting to apply the principles discussed above: (1) if the plaintiff succeeds in recovering against a third party, is a proportionate share of the expense of litigation allocable to, and deducted from, the employer's share of the recovery? The law in this

circuit is that the employer is entitled to full payment of its lien, without deduction of attorney's fees and costs, at least in cases where the total recovery from third parties exceeds the total compensation payable by the employer. Davis v. United States Lines Co., 253 F.2d 262 (3d Cir. 1958) (2) If the proceeds of the third-party judgment include interest from the date of judgment, is a pro rata share of that interest allocable to the employer's share of the judgment? Appellate authority on this point is meager, but seems to establish that the employer's lien attaches as of the date of entry of judgment, hence the employer is entitled

to a pro rata amount of interest, and the plaintiff-employee is entitled only to the interest on that part of the judgment which exceeds the employer's lien. Candiano v. Moore-McCormack Lines, Inc., 407 F.2d 385 (2d Cir. 1969).

(3) Can the employer's right of subrogation be terminated because of his "inequitable" conduct, and if so, what kinds of conduct on the part of the employer suffice to produce that result? It is this issue which is primarily involved in the present case. The foregoing references to the issues of attorney's fees and allowance of interest have been included here for contextual purposes, and because the precedents on those issues provide at least some guidance on the issue involved in the present case.

In essence, plaintiff contends that the employer has forfeited its subrogation rights in this case because, instead of cooperating with the plaintiff, or at least remaining neutral, the employer joined forces with the third party, assumed the defense of plaintiff's claim, and strove mightily to minimize plaintiff's recovery.

The facts are not in dispute. Plaintiff was working as a longshoreman, loading cargo. He was injured when one of the boards of a hatch cover on which he was standing gave way, and plaintiff dropped part way through the resulting hole. Plaintiff brought suit against the shipowner, claiming unseaworthiness; the shipowner then joined the employer as a third-party defendant, seeking indemnity under its contract for workmanlike service.

Before trial, the indemnity claim was settled. As between the shipowner and the employer, it was agreed that the employer would pay one-third of any recovery by plaintiff, and would assume the defense of the entire lawsuit. At trial, the unseaworthiness of the vessel was conceded. The defense efforts

were directed solely to attempting to establish that plaintiff was guilty of contributory negligence, and to minimize the amount of plaintiff's damages.

Initially, the jury found that plaintiff was guilty of contributory negligence, to the extent of 20%. Plaintiff's total damages were fixed inthe sum of $69,469,76, which, when reduced by reason of the 20% contributory negligence finding, resulted in a net verdict of $55,576.76. On appeal, the Court of Appeals concluded that there was insufficient evidence of contributory negligence to go to the jury, and directed reinstatement of the entire award, without reduction. Benson v. American Export-Isbtandtsen Lines, Inc., supra.

In addition to citing the generally adversary stance assumed by the employer in this litigation, plaintiff charges the employer with acting in bad faith in two particulars: In attempting to inject the issue of plaintiff's contributory negligence, when there was no evidence to support such a finding; and in using certain information in its compensation files to impeach plaintiff's credibility on the issue of damages. On the latter point, it appears to be plaintiff's contention not only that the information should not have been used at all, but that the wording of the cross-examination in which the information was used improperly and unnecessarily revealed to the jury the fact that compensation was being paid.

The gist of plaintiff's argument is that subrogation is an equitable doctrine, and its assertion is subject to equitable defenses; and that considerations of equity and fair dealing require that, in the present case, the employer should be precluded from asserting its subrogation rights.

However, the circumstances of the stevedore-employer clearly distinguish this case from the cases cited by the plaintiff.

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Here, the stevedore was charged with liability for indemnity, pursuant to its contract with the shipowner. It was faced with the possibility that the litigation might result in the imposition of liability far in excess of its liability under the compensation statute. The stevedore could properly defend itself against the imposition of any such liability. It might have done so by exonerating itself from the breach of contract charge, or by contesting the merits of plaintiff's original claim against the shipowner, including the amount of plaintiff's damages; or it could have pursued both of these courses of action. Surely, plaintiff should not be permitted to control the stevedore's choice of strategy. And I am not persuaded that the settlement arrangement between the stevedore and the shipowner can be regarded as eliminating any of the stevedore's strategic choices.

Specifically, I see no impropriety in the stevedore's using information from its own compensation file in defending itself, even though such defense might (and, in this case, because of the settlement agreement, obviously did) also aid the ship-

owner in its defense. It should be noted that the Court of Appeals found no error in the manner in which this material was used. And I have difficulty in finding support for a charge of bad faith by reason of the assertion of a claim of contributory negligence, when the jury found such contributory negligence on evidence believed adequate by this Court and by the dissenting judge in the Court of Appeals.

The Longshoremen's and Harbor Workers Act provisions governing the employer's rights of subrogation focus primarily upon guaranteeing to the employee, as a minimum, the payments provided by the Act; enabling the employee, if he chooses, to sue third parties for additional damages; and making sure that the employee does not obtain a double recovery of any portion of his damages.

As the statute has been interpreted by the courts, it can be characterized as evincing a congressional intent to exact from the employee a small price: in exchange for the assurance of absolute liability of his employer for compensation payments, the employee who desires to seek damages from third parties is required to bear the full brunt of attorney's fees and litigation expenses involved in the attempt, and to run the risk that his employer, in protecting its own interests, may make his recovery from third parties more difficult.

Counsel for plaintiff has cited only one case in which a right of subrogation was denied in a context somewhat analagous to the present case. In Arendas v. Rich & Co., 220 F.Supp. 957 (W.D. Pa. 1963), a case arising under the Pennsylvania Workmen's Compensation Act, the injured employee brought suit against a third party for damages, and his employer was joined as an additional defendant. The verdict was against the plaintiff, and neither of the defendants sought a new trial. Plaintiff did seek a new trial, whereupon his claim was settled, for a modest sum, by the original defendant. The court refused to recognize any lien against the settlement proceeds for workmen's compensation payments. While the opinion can be interpreted as holding that the employer's failure to cooperate with the plaintiff in his attempt to recover from the third party barred assertion of a lien, it can also be interpreted as holding that the employer waived its lien by acquiescing in a verdict which would have denied recovery altogether. More importantly, the case was before the court for approval of the settlement agreement; actually, all that was decided was that the court would not have approved the settlement as fair except as a settlement net of lien. Moreover, under Pennsylvania law, the liability of an employer for contribution cannot exceed the statutory liability under the Workmen's Compensation Act. O'Neill v. U.S., 450 F.2d 1012

(3d Cir. 1971). It is thus more difficult to justify actions on the part of a Pennsylvania employer which are adverse to the employee, than in cases, such as the present case, where the employer's potential liability is not so limited.